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# Supreme Court of the United States

October Term 1947

No. 124

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust Dated June 18, 1920, with Builders Trust Company as Trustee;

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust Dated June 18, 1920, with Builders Trust Company as Trustee designated as the "Robert Butler Trust".

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust Dated June 18, 1920, with Builders Trust Company as Trustee designated as the "Effie Butler O'Connor Trust".

Builders Trust Company,

*Petitioner,*

vs.

Walter P. Butler, Helen W. Butler, Effie Butler O'Connor, William Vernon O'Connor, Rosemary O'Connor Doll, Walter Butler O'Connor and Richard O'Connor; Builders Trust Company and James R. Faricy, Co-Trustees of Trust created under Indenture of Trust on June 18, 1920, by Walter Butler for the benefit of Walter P. Butler, Robert Butler, Walter Butler III, Mary Butler and Catherine Butler,

*Respondents.*

## PETITION OF BUILDERS TRUST COMPANY, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

BUILDERS TRUST COMPANY,

a Minnesota Corporation,

Petitioner.

LOUIS P. SHEAHAN,

Petitioner's Attorney,

1300 Minnesota Building,

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**PETITION OF BUILDERS TRUST COMPANY, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the above named petitioner, Builders Trust Company, and presents this its petition for a rehearing of the petition for a writ of certiorari in this cause.

## I

### JURISDICTION

The petition for a writ of certiorari, in this cause, was filed, in this Honorable Court, on the 13th day of June, 1947, and was denied by the order of this Honorable Court on the 13th day of October, 1947. This petition is filed within less than twenty-five days thereafter, under Rule 33, Revised Rules of the Supreme Court of the United States adopted February 13, 1939, effective February 27, 1939. The said rule 33 reads as follows:

"A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

The time for the filing of a petition for such a rehearing has been neither shortened nor enlarged by any order of this Honorable Court.

## II

**REASONS FOR PETITION FOR REHEARING**

1. The petitioner, upon reanalysis of the petition for certiorari and the supporting brief, after the denial of said petition, apprehends that such denial might be attributable to unfortunate selection of language or lack of clarity of expression in the petition and supporting brief by reason whereof the dominant Federal Constitutional questions were obscured.

2. The petitioner, Builders Trust Company, in this proceeding, under and pursuant to Sec. 8100-13, Mason's Minnesota Statutes, 1927, 1940 Supplement, sought merely the construction of certain provisions common to the several governing Indentures of Trust applicable to the several Trusts administered by the petitioner, as the sole Trustee in each case. The subject trust instrument provisions read as follows:

"Expenses—Trustees' compensation.

There shall be paid out of and deducted from the gross income all expenses incurred in the administration and protection of the trust estate, all taxes, and the compensation of the Trustees. The Trustee or Trustees shall have a right to receive compensation for their services, to be determined by the Trustee or Trustees, but the aggregate of such compensation shall not exceed five per cent (5%) of the gross income of the trust estate, and the amount paid to the Trustee or Trustees as such compensation at the time of the distribution of the principal of the trust estate of any part thereof shall not exceed three per cent (3%) of the amount of the principal distributed."

"Offices, Clerks, Etc.

The Trustees are hereby empowered to employ such clerks and other persons and to do and perform such acts and

things as they may deem requisite for the proper and convenient execution of said trust, and all expenses, including the compensation of the Trustees, shall be paid or provided for prior to any distribution of income or principal to the beneficiaries in this instrument designated and prior to the accumulation and addition of income to the principal or body of the trust estate."

3. The pertinent petition in the State Court, among other recitals, contained recitals, to the effect, that the Trustee, in respect to each such Trust, had necessarily incurred and would in the future necessarily incur expenses in and for the administration and protection of the Trust Estate and the execution of the Trust, on account of Clerk's hire, office expense and attorneys fees; that the Trustee had construed the aforesaid subject provisions of the Indenture of Trust, in each case, as entitling the Trustee to reimbursement, in full, from the Trust Estate, or the Gross Income of the same, on account of each such item of expense theretofore and thereafter incurred by it necessarily in and for the administration and protection of the Trust Estate and the execution of the Trust, all additional to and apart from its compensation for its services as Trustee; and that the Trustee, in respect to each such Trust, contemplated the compilation of a complete accounting and it was advisable in such regard, that the Court under its Order, in the premises, construe and apply such quoted provisions and accordingly instruct the Trustee, prior to the compilation by the latter of its contemplated complete accounting, in respect to each such Trust. (Rec. pp. 1 to 14, incl., ff. 1 to 41, incl.)

4. The submission of questions of law in respect to the proper interpretation of the subject trust instrument provisions as distinguished from the submission of any claim of the trustee for adjudication, represented the restricted scope and



purpose of the instant proceeding. (Petition, Rec. pp. 1 to 11, incl., ff. 1 to 33, incl.) The sphere of this proceeding thus circumscribed, apart from the said petition in the State Court, is manifested by the petitioner's opening statement (Rec. pp. 45 to 56, incl., ff. 133 to 168, incl.) and by the evidence adduced upon the hearing and contained in the settled case herein (Rec. pp. 45 to 123, incl., ff. 133 to 369, incl.).

5. This proceeding, as aforesaid, had for its limited purpose the submission of pure questions of law involved by the interpretation of the subject trust instrument provisions, for determination by the Court, as distinguished from and exclusive of the submission for adjudication or allowance of any item of administration expense or claim on such account. The testimony and evidence were accordingly restricted and limited. There was no attempt under the petition, by the testimony or otherwise, to submit for adjudication or allowance any such expenditure or claim and the evidence was restricted to that designed to acquaint the Court with the methods pursued and required to be pursued in the administration of the subject trust estates and the various purposes, in such connection, on account of which the trustee was required to incur administration expenses. (Petition, Rec. pp. 1 to 11, incl., ff. 1 to 33, incl.) (Settled Case, pp. 45 to 123, incl., ff. 133 to 369, incl.)

6. The evidence, in this proceeding, conclusively established that except for its activities, from 1920 to 1927, as Trustee, of two trusts created by John Butler and Emmett Butler; the business operations and activities of petitioner, Builders Trust Company, have been restricted and confined to its administration, as trustee, in each respective case, of six separate trusts, created by Walter Butler, late of Ramsey County, Minnesota, Trustor, under a separate Indenture of

Trust, in each case, with petitioner, Builders Trust Company, Trustee, and three minor trusts subsidiary to one of said six trusts. The said six separate trusts, created by Walter Butler, indicative of the beneficiary in each instance, are respectively designated as "the Walter Butler Trust," "the Helen W. Butler Trust," "the Walter P. Butler Trust," "the Effie Butler O'Connor Trust," "The Robert Butler Trust" and "the John E. Butler Trust"; that the proper administration of such Trust Estates and the proper execution of the applicable Trusts, by petitioner as Trustee, under the pertinent Indentures of Trust, from the inception of petitioner's activities in such regard, until the present, consistently and necessarily involved the employment of clerks in and for the performance of clerical work constantly requisite and directed to such administration of said Trust Estates and such execution of said Trusts and the incurring, by petitioner, as such Trustee, of administration expenses therefor; that the aforesaid necessary clerical work for and directed to such trust administration purposes involved bookkeeping, accounting, general office work, the procurement of information relative to the availability and market values of investment securities for consideration and use in connection with the Trustee's activities relating to the investment, reinvestment and the retention in investments of the funds of said Trust Estates; that such necessary clerical work for said purposes was performed, at all times, by clerical employees under the supervision and subject to the direction of the petitioner Trustee; that such necessary clerical work for and directed to such trust administration purposes from 1932 and thereafter until the time of the hearing before the District Court, was regularly performed by two persons employed therefor by the Trustee, namely Messrs. Eriksen and Faricy, on account

whereof the Trustee regularly incurred monthly expense represented by salaries required to be paid by it therefor to Messrs. Eriksen and Faricy in the amounts of \$150.00 and \$330.00, respectively; that all such clerical work, by Messrs. Eriksen and Faricy was necessary and directed to the proper administration of said Trust Estates and the proper execution of said Trusts, by petitioner as such Trustee, and that said monthly salaries incurred and paid therefor, have been consistently representative of reasonable expenses incurred by petitioner, Builders Trust Company, Trustee, for clerical work actually performed and requisite to the proper administration of such Trust Estates and the proper execution of said Trusts, by petitioner-trustee. (Rec. pp. 58 to 62 incl., ff. 174 to 181 incl.) (Petitioner's Exhibit "F", Indentures of Trust, Rec. pp. 98, 99, ff. 294 to 296, incl.; pp. 129 to 150, incl., ff. 385 to 450, incl.) (Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.) (Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.) (Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.) (Rec. pp. 81, 82, ff. 243, 244).

7. The evidence, in this proceeding, without controversy, conclusively established, that the Trustee, in each instance, had made distribution of a portion of income and principal to the beneficiaries presumably in accordance with the applicable provisions of the trust instrument; that the Trustee, in each instance, had made deductions from income merely in partial payment of its compensation and merely in partial reimbursement of its administration expenses; that the Trustee quarterly issued statements to the beneficiaries, in each case, merely in respect to receipts and disbursements; that in no case had the Trustee issued any statement of accounts which purported to include all claims which the Trustee might have had for deduction from income on account of its

administration expense; that the matter of the final allocation of the considerable undistributed income, in each case representing approximately \$600,000 was intended to be dealt with in the future under the contemplated original comprehensive account of the Trustee; that the Trustee had made ample provision for the deduction of reimbursement on account of all its administration expenses which had not been reimbursed to the Trustee by deductions from income by the retention in the possession of the Trustee of the undistributed and unexpended portions of income aggregating as aforesaid, in each case, approximately \$600,000. (Rec. pp. 45 to 160, incl., ff. 133 to 480, incl.)

8. The law of Minnesota which formed a part of the obligations of the subject contract, the Indenture of Trust, in each case, reserved to the Petitioner as such Trustee, upon the facts stated, a lien upon the retained balances of gross income and the corpus of each Trust Estate, for the enforcement by the Petitioner as Trustee, of all claims of the latter on account of necessary administration expenses representing deductible items, in the Trustee's favor, under the subject Trust instrument provisions. The Minnesota Supreme Court enunciated the following rule in *re Truesdal v. Philadelphia Trust, Safe Deposit & Ins. Co.* (65 N. W. 133, 135) :

"And the general rule is that such expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands, and he will not be compelled to part with his control of the estate until such expenses are paid."

The Mason's Minnesota Statutes 1927, Sec. 7737, provides, in part, as here applicable :

"Any trust company shall be entitled to reasonable compensation, or such amount as has been or may be agreed

upon by the parties, and all necessary expenses, with legal interest thereon, unless otherwise agreed upon."

The Minnesota Supreme Court, in a comparable, situation, in re Trusteeships under Last Will of Shirley H. Drake: Judson A. Drake v. Benjamin Drake (195 Minn. 464) (101 A. L. R. 801), said:

"There was a partial distribution of the assets of the Shirley Drake estate prior to June, 1925, and the defendant, as trustee for the plaintiff, apparently cared for what was distributed to the trust for the plaintiff without any qualification in the district court until June 16, 1925. On that date he qualified as trustee in the district court. He thereafter made annual accounts to the district court as trustee, and in each of said accounts charged against the trust estate \$150, under the heading of legal fees of the trustee. The plaintiff herein became of the age of 25 years in March, 1934, at which time, according to the terms of the will, the trust estate was to be paid and transferred to him. Early in June, 1934, the defendant made his final account to the district court of his trusteeship for the plaintiff. In that account, in addition to the \$150 a year charged by him as fees for the trustee, he included another item charging the trust estate with the sum of \$2,099.96 as amount owing to the trustee for services as of the date of June 8, 1934, but covering the entire period of his trusteeship. \* \* \*

"In the situation shown, it was for the trial court to determine whether defendant had waived his right to the additional compensation claimed or whether he was entitled thereto. We conclude that the trial court was justified in finding the defendant had not waived his right to the compensation asked, and that there was no abuse of discretion except as to one small matter."

The evidence, in this proceeding, without controversy, conclusively established that in 1927 the Trustor of the several

Trusts, Walter Butler, then Chairman of the Board of Directors of the Petitioner Trustee, Builders Trust Company, acting in concert with the Trustee, construed and applied the subject Trust instrument provisions as authorizing the deduction, in favor of the Trustee, from the gross income of the Trust Estates, on a pro rata basis, of expenses incurred by the Trustee, for clerical work requisite and directed to the administration of the Trusts during the seven and one-half year period between and including 1920 and 1927, unconditioned by any requirement for previous specific allocation from gross income on such account and despite the fact that during such period of seven and one-half years the Trustee had quarterly distributed portions of gross income of each Trust Estate to the beneficiaries as directed thereby. (Rec. pp. 97, 98, ff. 289 to 296 incl.) (Petitioner's Exhibit "E", Rec. pp. 127, 128, ff. 379 to 384 incl.) (Rec. pp. 100, 101, 102, ff. 299 to 306 incl.) (Petitioner's Exhibit "G" & "H" Rec. pp. 151 to 158 incl., ff. 451 to 474 incl.) (Rec. pp. 110, 111, ff. 330 to 333 incl.)

9. The Record conclusively demonstrates that the Petitioner, in this proceeding, neither sought nor had any opportunity to submit or establish for allowance of any item of Trustee's administration expense or Trustee's claim on such account; that the Petitioner, therein, neither sought nor had any opportunity to be heard on any question of waiver or forfeiture of any such claim; that there was no issue presented or litigated, in this proceeding, in respect to the allowability of any submitted claim of the Petitioner in respect to any item of Trustee's administration expense or in respect to any alleged waiver or forfeiture of any such claim; and that the Trustee has, consistently with the powers conferred on the latter by the subject Trust instrument provisions, in-

curring trust administration expenses, consistently reasonable in amount, for necessary clerical work, the maintenance of office and vault spaces and the retention of legal counsel for legal services, aggregating approximately \$100,000.00, properly the subject, in each instance, of a Trustee's claim for a deduction in a corresponding amount in the latter's favor from the retained gross income, in no part represented by any actual deduction from gross income and in no part represented by any submitted claim of the Trustee. (Rec. pp. 1 to 160 incl.) (Rec. pp. 58 to 62, incl., ff. 174 to 181 incl.) (Petitioner's Exhibit "F", Indentures of Trust, Rec. pp. 98, 99, ff. 294 to 296, incl.; pp. 129 to 150 incl., ff. 385 to 450, incl.) (Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.) (Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.) (Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.) (Rec. pp. 81, 82, ff. 243, 244).

10. The State Supreme Court, under its Opinion and Final Judgment, herein, arbitrarily and erroneously, contrary to all of the evidence and without there having been any issue thereon, adjudged all the aforesaid unrepresented claims of the Petitioner-Trustee on account of the latter's aforesaid administration expenses which had not been the subject of actual deductions from gross income, waived and forfeited and on such bases disallowable to the Trustee. The pertinent arbitrary and erroneous holding is in part incorporated in the following language quoted from said Opinion, viz:

"The record indicates that the entire income was either distributed, or accumulated and added to the trust principal, without paying or providing for the payment of any items not expressly included in the quarterly statements. No specific amount was ever set aside, by accounting segregation or otherwise, to indicate that any additional liabilities had been incurred or were ever contemplated



for which payment should later be made. In the light of the express and unmistakable trust indenture provision requiring that 'all expenses, including the compensation of the Trustees, shall be paid or provided for' prior to distribution of income and prior to the accumulation of any undistributed income to the trust principal, it follows that the trustee has waived and forfeited any right which it ever possessed to reimbursement for expense items heretofore incurred and the payment of which the trustee made no provision." (Rec. Proc. State Supreme Court, p. 168, ff. 495, 496)

The Record is silent in respect to whether or not any part of gross income had been specifically set aside for the payment of any of said expenses or any claim on account thereof in favor of the Trustee. There was no occasion for the introduction of any evidence in such regard since no such matter was either presented or litigated in this proceeding. The Trustee made ample provision, as aforesaid, by the retention of the balances of gross income approximating \$600,000.00 in each Trust, for the preservation and payment of such claims of the Trustee for deductions from gross income, on account of authorized and incurred Trustee's administration expenses. This arbitrary and unfounded holding of the State Supreme Court involved the employment by the Court of changed principles of law which represented an impairment of the obligations of the contract, the Indenture of Trust, which governed each subject Trust. The following excerpts from Minnesota Supreme Court decisions are indicative of the law which formed the obligations of said contracts:

In re Estate of Overvold, 186 Minnesota 359, 367, the Court said:

"Where waiver operates merely to dispense with notice or other formal requirement in a matter or proceeding or



to defeat a forfeiture, it is favored; but where the effect of a waiver is to deprive a party of a substantial property right without consideration, so that in effect it works a forfeiture, it is not favored. In such cases it should be necessary to show that the party claiming the waiver has been led to act thereon to his detriment. *Orr v. Sutton*, 127 Minn. 37, 58, 148 N. W. 1066, Ann. Cas. 1916 C, 527.

"An intention to waive an existing legal or property right must be clearly shown. *Shearer v. Barnes*, 118 Minn. 179, 136 N. W. 861; *Kubu v. Kabes*, 142 Minn. 433, 172 N. W. 496; *Clark v. Dye*, 158 Minn. 217, 197 N. W. 209; *Clark v. Cargill Elev. Co.*, 158 Minn. 429, 197 N. W. 845. Giving full effect to the facts disclosed and found, they do not sustain the conclusion that the appellants waived their rights to the proceeds of the homestead. What has been said in reference to waiver disposes also of any question of estoppel."

The State Supreme Court Opinion and Final Judgment, in and by said holding of waiver and forfeiture and disallowance of Trustee's claims, arbitrarily and unreasonably, erroneously and without any support in the Record, violate the Fourteenth Amendment to the Federal Constitution, since the same purport to deprive the Petitioner of its property represented by such claims for administration expenses without affording the Petitioner a hearing thereon or any real opportunity to present, establish or protect said claims, in any particular. The State Supreme Court Opinion and Final Judgment, in and by said holding of waiver and forfeiture and disallowance of Trustee's claims, also impairs the obligations of each subject contract or indenture of trust by substituting for the principles of law which formed a part of said obligations new legal principles diametrically opposed thereto and representing direct departures from the estab-

lished law of Minnesota applicable to the doctrines of waiver, forfeiture and estoppel, all to the prejudice of the Petitioner and in violation of the rights secured to the Petitioner as one of the two contracting parties in respect to each subject contract or indenture of trust, under and by virtue of Sec. 10 of Article I of the Federal Constitution.

11. The State Supreme Court, under its Opinion and Final Judgment, herein, arbitrarily and erroneously, contrary to all of the evidence, without there having been any issue thereon, adjudged all the aforesaid unrepresented claims of the Petitioner-Trustee on account of the latter's aforesaid administration expenses, wholly disallowable to the Trustee on the bases aforesaid of waiver and forfeiture and on the further basis, in respect to the clerical work performed by Messrs. Eriksen and Faricy in the employment of the Trustee in the administration of the several Trusts, that such clerical work, though properly the subject of delegation by the Trustee to the persons employed, was ministerial in character and non-compensable or non-reimbursable to the Trustee from gross income or otherwise from the Trust estates despite the express language of the subject Trust instrument provisions authorizing the employment of clerks and the deduction of expenses incurred on such account by the Trustee in the administration of each separate Trust from the gross income of the same. The pertinent arbitrary and erroneous holding is in part incorporated in the following language quoted from said Opinion, viz:

"Again returning to the elementary principle that language free from doubt leaves no room for construction or interpretation, we come to the problem of its application to the unitalicized portion of paragraph 22 of the trust indenture, which provides:

'The trustees are hereby empowered to employ such clerks and other persons and to do and perform such acts and things as they may deem requisite for the proper and convenient execution of said trust, \* \* \*'

"It cannot be said that the plain and unambiguous import of the foregoing language justifies a conclusion that the settlor intended to vest in the trustee an arbitrary right to employ 'such clerks and other persons' as it should deem requisite, proper, and convenient without regard to the customary and well-recognized principles of trust estate administration. Likewise, paragraph 12 in providing for the payment of general trust administration expenses creates no powers other than those usually conferred upon a trustee. The settlor was an able and experienced business executive, well versed in established business practices. His language should not be given such a literal and narrow construction that the subject matter and purpose of his bounty are forgotten. His primary objective was to protect and benefit the cestuis, not the trustee. In vesting the trustee with a broad discretion, there is nothing to indicate that the settlor intended thereby to relieve the trustee of the normal duties and functions incident to that office and in consideration for which the usual compensation was to be paid. Taking these trust provisions as a whole and keeping in mind the purpose of the trust, it seems clear that the settlor intended thereby merely to give the trustee a wide discretion in the exercise of its authority to employ such persons as might be necessary or desirable for the advantageous execution of the trust, and that these provisions have no bearing on the determination of what services are properly chargeable to the estate as distinguished from the services to be rendered or furnished by the trustee in return for its compensation. The fact that the settlor named as trustee a trust company, which by the guidance of its officers has been so restricted in its operations as to have no business or income aside from that derived from the management of the trusts

established by the settlor or the members of his family or that the ownership of the trust company's common stock has changed so as to be practically concentrated in a single stockholder is no justification for placing such trustee in a different compensation classification from that of other corporate or noncorporate trustees. Trusts are not established for the purpose of providing a trustee with its sole means of maintenance. \* \* \*

"Restatement, Trusts ff. 188, comment c, relating to the employment of agents, provides:

'The trustee can properly incur expenses in employing attorneys, brokers or other agents or servants so far as such employment is reasonably necessary in the administration of the trust. He cannot properly incur expenses, however, in employing agents to do acts which the trustee ought personally to perform, as where it would be an improper delegation of his duties or powers to act through an agent (see ff. 171), or where although it would not be an improper delegation to employ an agent yet the service of the agent is one which is covered by the trustee's compensation.'

"What are the usual and normal services to be performed by a trustee in return for his compensation? All services involved in the exercise of his discretionary powers or duties in managing the trust and, in addition, certain ministerial duties, are covered by such compensation. Clearly, one of the ministerial duties which a trustee should perform in return for his specified remuneration is that involved in the routine chore of keeping accurate and complete bookkeeping records and in preparing periodic administration accounts. 2 Perry, Trusts and Trustees (7 ed) ff. 9115 \* \* \*

"In the application of these principles to the instant case (having in mind that the trustee may not be reimbursed for any unpaid expense items, regardless of their nature, which were heretofore incurred and for the payment of which no provision was made prior to the distribution of income and prior to the accumulation of un-

distributed income to the trust principal), we find no error in the trial court's determination that the services of Erickson and Faricy, as illustrated by their past employment activities as revealed by the record herein, are not chargeable to the estate. At best, such services have been merely of a ministerial nature and confined to such ministerial duties as are usually rendered by a trustee in return for his compensation." (Rec. Proc. State Supr. Ct., pp. 169 to 171, incl., 173, ff. 498 to 501, incl., 506.)

The inclusion in a trust instrument comparable to each trust instrument here involved of provisions empowering the Trustee to employ clerks and other persons in the performance of clerical work necessary to the administration of the Trust Estate and to deduct the amount of all expenses to be incurred, from income, would not contravene any law or any matter of public policy. The Opinion, in respect to the basis for the construction placed upon the subject trust instrument provisions thereby gives no apparent consideration to the uncontrovertible fact, appearing in the Record, that both Trustor and Trustee, acting in concert, construed such trust instrument provisions as empowering the Trustee to employ clerks and other persons in the performance of ordinary clerical work requisite to the administration of each Trust Estate and to deduct full reimbursement on account of all expense thus incurred, by the Trustee, from gross income. This construction of the subject trust instrument provisions was exemplified by Petitioner's Exhibit "E" the resolution and transcript of the Minutes of the Meeting of the Board of the Directors of Builders Trust Company held July 21, 1927, and by Petitioner's Exhibits "G" and H1 and 2. (Rec. pp. 97, 98, ff. 289 to 296, incl.) (Petitioner's exhibit "E" Rec. pp. 127, 128, ff. 379 to 384, incl.) (Rec. pp. 100, 101, 102, ff. 299 to 306, incl.) (Petitioner's Exhibit "G" and "H")

(Rec. pp. 151 to 158, incl., ff .451 to 474, incl.) (Rec. pp. 110, 111, ff. 330 to 333, incl.)

The construction of exclusion and disallowance of administration expenses incurred by the Trustee on account of requisite clerical work represented in the above quoted language of the State Court Opinion is palpably unreasonable, arbitrary, erroneous and violative of the rights secured to Petitioner as a party to the subject contract or indenture of trust applicable to each separate trust secured to the latter by Section 1 of Amendment XIV to the Federal Constitution since the same arbitrarily and unreasonably deprive Petitioner of that freedom of contract secured to the latter by said Federal Constitutional Amendment and arbitrarily and unreasonably deprive Petitioner of its property represented in the aforesaid claims for deductions from gross income on account of such administration expenses adjudicated thereby as disallowable, all without there having been afforded to the Petitioner an opportunity to be heard thereon and in denial of the Petitioner's right to establish, preserve and protect its property represented by said claims, all without due process of law.

This Honorable Court in *Baltimore and Ohio Southwestern Railway Company v. Voight*, 44 Led. 560, 565 said:

"At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

This Honorable Court in *Prudential Ins. Co. v. Cheek*, 66 Led. 1044, 1051, said:

"That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly, or arbitrarily interfered with, consistently with the due process of law guaranteed by the 14th Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. *Adair v. United States*, 208 U. S. 161, 174, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, 446, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240."

The State Supreme Court arbitrarily and unreasonably divides the subject trust instrument provisions incorporated in the following one sentence paragraph:

"The Trustees are hereby empowered to employ such clerks and other persons and to do and perform such acts and things as they may deem requisite for the proper and convenient execution of said trust, and all expenses, including the compensation of the Trustees, shall be paid or provided for prior to any distribution of income or principal to the beneficiaries in this instrument designated and prior to the accumulation and addition of income to the principal or body of the trust estate."

by separating the single sentence so as to deal in the first instance with the following clause, "The Trustees are hereby empowered to employ such clerks and other persons and to do and perform such acts and things as they may deem requisite for the proper and convenient execution of said trust," separate and apart and detached from the balance of the



single sentence thus arbitrarily and unreasonably giving an apparent occasion for the diverse rules of construction which the said Court has employed. The sentence representing the above quoted complete paragraph represents a compound sentence expressing the complementary provisions authorizing the Trustee to employ clerks and other persons and to do and perform such acts and things as the Trustee may deem requisite for the proper and convenient execution of the trust and authorizing the payment of all expenses thus incurred by the Trustee and the compensation of the Trustee from gross income. The language of the trust instrument provisions, above quoted, is plain and unambiguous and the parties to the subject contract incorporating the same, the Indenture of Trust applicable to each separate trust, the Trustor and the Trustee equally have the Federal Constitutional right to the interpretation, application and enforcement of said provisions consistently according to the ordinary meaning of the language employed therein. The subject provisions of the Trust instrument in each case clearly and beyond doubt empower the Trustee to employ clerks for the performance of clerical work requisite to the administration of the Trust estate and to deduct all reasonable and necessary expenses in such regard together with the Trustee's compensation from gross income. Such is the plain meaning of the language of the Trust instrument provisions. The State Supreme Court arbitrarily and unreasonably erroneously seeks to substitute and by the language of its holding has substituted for the language of the Trust instrument provisions and the plain meaning of such language inconsistent and unnecessary extraneous general principles of trust administration which might be useful in cases distinguishable from the instant situation, where there was no trust instrument, or where the trust instrument was silent or ambiguous



in respect to the power of a Trustee to employ others and to deduct expenses thus incurred for administration from gross income. The State Supreme Court by its holding paradoxically employs the language according to its ordinary meaning in regard to the power thereby granted to the Trustee for the employment of clerks for the performance of clerical work requisite to the Trust administration and conversely casts out the complementary language authorizing the Trustee to deduct expenses incurred by the latter on such account from gross income and inserts or reads into the Trust provisions principles of a contrary meaning in place and stead of the express provision for the payment of expenses of such nature from gross income.

The above quoted holding arbitrarily and unreasonably, erroneously and unlawfully, without due process of law, deprives the Petitioner of that freedom of contract secured to the latter by Section 1 of the Fourteenth Amendment to the Federal Constitution. The above quoted holding of the State Supreme Court arbitrarily, unreasonably, erroneously and unlawfully, without due process of law, deprives the Petitioner of its property in the Petitioner's aforesaid claims resultant from the aforesaid administration expenses which said holding purports to disallow, without there having been afforded to the Petitioner any real opportunity to be heard thereon or to establish, preserve or protect such property of the Petitioner, all in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

## REASONS FOR ALLOWANCE OF WRIT

The Petitioner under this subdivision makes reference to the Petitioner's petition for a Writ of Certiorari herein and its petition for rehearing in the Minnesota State Supreme Court in this proceeding, and hereby incorporates said petitions herein with the same intent, purpose and effect as if such petitions were fully set forth in this instrument. The Petitioner, respectfully, submits that there were presented, in this cause, Federal Constitutional Questions, specially set up in the said Petition for Rehearing, by Petitioner whereunder Petitioner set up and claimed rights, privileges and immunities under Sec. 10 of Article I of the Federal Constitution and Sec. 1 of Amendment XIV of the Federal Constitution; that said Federal questions were decided by said State Supreme Court, by its said Opinion and said Final Judgment, in this cause in a way not in accord with the applicable decisions of this court, and that the Federal questions thus presented and determined were substantial in character. (Rec. Proc. St. Supr. Ct. pp. 161 to 183, incl., ff. 481 to 526, incl., pp. 215, 216, ff. 590 to 592, incl., pp. 183 to 211, incl., ff. 526 to 582, incl.)

The State Supreme Court Opinion and Final Judgment, in this cause, are at material variance with the decisions of this Honorable Court, and in the particulars hereinbefore mentioned, deprive Petitioner of its liberty and freedom of contract and property without due process of law and the enforcement of said Final Judgment of said State Supreme Court, will deprive Petitioner, as distinguished from others, of substantial Federal Constitutional rights secured to it as aforesaid by said Sections of the Federal Constitution all to the substantial and irreparable loss and detriment of the Petitioner and without there having been afforded to the Peti-

tioner the minimal requirements of due process of law secured to Petitioner by said Sec. 1 in said Amendment XIV to the Federal Constitution. (Rec. Proc. St. Supr. Ct. pp. 161 to 183, incl., ff. 481 to 526, incl., pp. 215, 216, ff. 590 to 592, incl., pp. 183 to 211, incl., ff. 526 to 582, incl.)

### III

#### QUESTIONS PRESENTED

The Petitioner expressly reserves for consideration all of the questions presented under and by the Petition for a Writ of Certiorari heretofore filed by the Petitioner herein, particularly those questions set out in paragraphs Nos. 1 to 5 inclusive on Pages 21 to 23 inclusive of said last mentioned petition. The Petitioner expressly reserves and incorporates herein, by reference, the Petition for Writ of Certiorari, Assignment of Errors and Brief in Support of Petition filed by the Petitioner in this cause on June 13, 1947, and reiterates the same word for word herein. The Petitioner, by reference, hereby incorporates herein, its Petition for Rehearing, filed in the State Supreme Court and reiterates the same word for word herein. The State Supreme Court, in this cause, by its said Final Judgment arbitrarily and erroneously decided the Federal Constitutional Questions presented by this Petitioner under its last mentioned petition for rehearing, adversely to the claims of this Petitioner in a way probably not in accord with the applicable decisions of the Supreme Court of the United States and in a manner so as to unlawfully deny Federal Constitutional rights to due process secured to the Petitioner by Section 1 of the Fourteenth Amendment to the Federal Constitution and in a manner so as to unlawfully deny the Federal right to the preservation of the obligations of the

subject contracts secured to the Petitioner under Section 10 of Article I of the Federal Constitution, all as more particularly appears from said Petition for Writ of Certiorari, Assignment of Errors and Brief in Support of Petition and the statements of this petition hereinabove set forth. The Federal questions thus presented for decision, by the Petitioner, in the State Supreme Court were presented for decision to the Highest Court of the State having jurisdiction, seasonably, and the decision of each such Federal question was necessary to the determination of this cause and each such Federal question was actually decided thereunder and the Final Judgment as rendered by the State Supreme Court in this cause could not have been given without deciding each such Federal question.

#### **IV**

#### **CONCLUSION**

For the foregoing reasons, the Petitioner, Builders Trust Company, respectfully prays that a rehearing of the Petition for a Writ of Certiorari in this cause be granted; that upon further consideration the Order of this Honorable Court denying said Petition for a Writ of Certiorari dated October 13, 1947, be revoked and vacated; that a Writ of Certiorari issued to the Supreme Court of the State of Minnesota as prayed for in the Petition for a Writ of Certiorari herein filed the 13th day of June, 1947; and that this Honorable Court will proceed to review this cause and the aforesaid

Opinion and Final Judgment of the Supreme Court of the State of Minnesota therein upon Certiorari.

BUILDERS TRUST COMPANY,  
a Minnesota Corporation,  
Petitioner.

LOUIS P. SHEAHAN,  
Petitioner's Attorney,  
1300 Minnesota Building,  
St. Paul 1, Minnesota.

I, Louis P. Sheahan, Counsel for the above-named petitioner, Builders Trust Company, do hereby certify that the foregoing petition for a rehearing of the petition for a writ of certiorari, in this cause, is presented in good faith and not for delay.

LOUIS P. SHEAHAN,  
Attorney for Petitioner,  
Builders Trust Company.